



**THE SUPREME COURT
DETERMINATION**

**THE PEOPLE AT THE SUIT OF THE
DIRECTOR OF PUBLIC PROSECUTIONS
AND**

GAVIN SHEEHAN

APPLICANT

Neutral Citation: [2021] IESCDET 18

Supreme Court Record No.: S:AP:IE:2020:000114

Court of Appeal Record No.: A:AP:IE:2017:000055

Circuit Criminal Court Bill No.: CKDP0212/2016

Date of Determination: Wednesday, 10th February 2021.

Composition of Court: O'Donnell J., Charleton J., Woulfe J.

Status: Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF THE
CONSTITUTION APPLIES**

RESULT: The Court grants leave to the applicant to appeal to this Court from the Court of Appeal.

ORDER SOUGHT TO BE APPEALED

REASONS GIVEN:

COURT: COURT OF APPEAL
DATE OF JUDGMENT OR RULING: 25 th May 2020
DATE OF ORDER: 25 th May 2020
DATE OF PERFECTION OF ORDER: 12 th October 2020
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 20th OCTOBER, 2020 AND WAS IN TIME.

General Considerations

- 1.** The general principles applied by this Court in determining whether to grant or refuse leave to appeal, having regard to the criteria incorporated into the Constitution as a result of the Thirty-third Amendment, have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *BS v. Director of Public Prosecutions* [2017] IESCDT 134, (Unreported, Supreme Court, 6 December 2017) and in a unanimous judgment of a full Court delivered by O'Donnell J. in *Quinn Insurance Ltd. v. PricewaterhouseCoopers* [2017] IESC 73, [2017] 3 I.R. 812. Accordingly, it is unnecessary to revisit the new constitutional architecture for the purpose of this determination.

Background

- 2.** This determination concerns a decision of the Court of Appeal (McCarthy J; Edwards J. and Kennedy J. concurring) which dismissed an appeal by the applicant. The applicant was convicted in the Circuit Criminal Court (Cork) of offences involving possession of a firearm contrary to s. 27A of the Firearms Act, 1964, possession of ammunition contrary to the same provision, unlawful discharge of a firearm contrary to s.8 of the Firearms and Offensive Weapons Act, 1990, and assault causing serious harm contrary to s.4 of the Non-Fatal Offences against the Person Act, 1997. In addition, and prior to his trial, he pleaded guilty to two counts of criminal damage contrary to s.2 of the Criminal Damage Act, 1992. The applicant was subsequently sentenced on the 14th February, 2017 to a term of fourteen years' imprisonment with the final three years suspended in respect of each of the possession counts, seven years' imprisonment in respect of the unlawful discharge count, and to twelve years' imprisonment with the final two years suspended in respect of the count of section 4 assault, to run concurrently.
- 3.** The circumstances of the offences are set in full in the judgment of the Court of Appeal. These offences concern incidents which occurred on the night of the 14th/15th May, 2016, in the Laurel Ridge and Hollywood Estate area of Shanakiel, Cork: these are two housing estates situate immediately adjacent to each other and between Blarney Road and Harbour View Road. Prior to the shooting on the evening of Saturday the 14th May 2016, at approximately 7.00pm, one Dylan Cunningham was in a fast food restaurant known as "Dinos" in Blackpool with his girlfriend, Ciara Sheehan, who was later shot. The applicant entered the premises and punched Dylan Cunningham in an unprovoked assault. Later that evening, Dylan Cunningham's

home at No. 37 Hollywood Estate was subject to criminal damage, in that at 12.15am the front patio door was smashed. A short time later, the home of the applicant at No. 7 Laurel Ridge was also subject to criminal damage, at approximately 12.30am when windows were broken. At approximately 1.00am or a few minutes thereafter (there was much debate at the trial as to times) on Sunday the 15th May 2016, Ciara Sheehan was standing in the front room of No. 37 Hollywood Estate when she heard what she described as a loud bang like a firework and then she heard buzzing in her ear. She had been shot in the neck. Ms. Sheehan was taken to Cork University Hospital where she received medical attention and, on examination, the medical team identified a penetrating wound to her right neck from which a bullet was removed.

- 4.** When dealing with the call to the Gardaí occasioned by the damage to No. 37 Hollywood Estate, the Gardaí were notified that the property of one Michael Condon at No. 57 Harbour View Road was damaged by two male youths. Inspector Ronan Kenneally, on his way to the shooting incident at Hollywood Estate, observed the applicant, being one of them, committing criminal damage to the house and a car; charges arising therefrom gave rise to pleas of guilty. The applicant left in a Nissan Almera with a 02 C registration; this vehicle came to a stop at Harbour View Road at the entrance to Laurel Ridge and the applicant alighted from the front passenger seat and ran into Laurel Ridge. He was followed by a Garda, and after a chase he was arrested for the possession of a firearm at No. 37 Hollywood Estate with intent to endanger life.
- 5.** The car from which the applicant alighted was found to have a golf club, a hurley and a mobile phone in the footwell of the front passenger side. As part of the investigation, the applicant's home at No. 7 Laurel Ridge was searched pursuant to s. 29 of the Offences Against the State Act 1939, as amended. No firearm was recovered; however, during the search, a CCTV system was recovered which proved to be probative. This showed the applicant at 12.05am (in fact, 12.51am as the system was 46 minutes behind time) on the morning in question with a gun in his right hand, and some two minutes later getting a glove from the car in the drive and putting it on his right hand. At 1.08am (correct in time) he could be seen leaving his own home and climbing over a wall into Hollywood Estate. Four minutes and five seconds later, he was seen to return to the front of his house from the opposite direction with no firearm in his hand.

6. During the afternoon of Sunday the 15th May 2016, a Garda Dave Barry recovered a Smith & Wesson pistol, a firearm as defined under the Firearms Acts, at the base of a 1m high dividing wall at Hollywood Estate and Laurel Ridge. A discharged shell was found on the 10th June 2016, at the rear of No. 37 Hollywood Estate. The bullet recovered from Ms. Sheehan's neck had class characteristics comparable to those of the Smith & Wesson semi-automatic pistol recovered. This ammunition was ammunition as defined under the Firearms Act.
7. The mobile phone recovered in the Nissan Almera showed a "dialogue stream" from Facebook. During his detention, the applicant was interviewed and during interview he acknowledged that the Nissan Almera car was his, and he accepted that the golf club and hurley found in that car were also his. He said that he may have gone to Hollywood Estate on the night in question; the reason he gave was: "to talk to a girlfriend or to get picked up, I don't know". He acknowledged that he was in dispute with the Cunninghams. He failed to cooperate in any way in relation to the shooting incident or to assist in the recovery of the firearm while in custody.
8. On the first day of the trial and prior to any evidence having been given, Senior Counsel for the defence made an application for permission for himself, junior counsel and their instructing solicitor to come off record. The learned trial judge was informed that the accused had "lost confidence" in his legal team and no longer wished to be represented by them. The trial judge refused the application and stated that its "timing is doubtful". The Court of Appeal did not think that this was one of those rare situations where a trial judge could refuse to permit the applicant to discharge his solicitor and counsel as he had an undoubted right (though not absolute) to act in person. The Court of Appeal also held, however, that even though the trial judge fell into error in failing to permit the applicant to appear in person, the Court did not believe it to be an error of substance in the circumstances. The Court felt that this ground of appeal was a good example of where the *proviso* under s. 3 of the Criminal Procedure Act 1993 could properly be applied, and the conviction affirmed, as the Court considered that no miscarriage of justice had actually occurred.

Decision

9. The applicant contends that the Court of Appeal decision involves a number of matters of general public importance. The first two interlinked matters involve firstly, the principles to be applied where an accused person, at a point shortly before his trial is due to commence, wishes to discharge his solicitor and counsel and to act in

person and secondly, the application of the *proviso* in s. 3 of the Criminal Procedure Act 1993, in such circumstances where an error occurs. The next two matters contended for by the applicant relate to the inference provisions in s. 18 of the Criminal Justice Act 1984, and, in particular, as to whether data downloaded from a mobile phone can amount to an "object, substance or mark" within the meaning of that provision, and what amounts to a failure or refusal "to account" for the purposes of same.

- 10.** The respondent contends in reply that the decision of the Court of Appeal on each of these matters involved the application of well settled principles. As regards the fourth matter, they point to the most recent Supreme Court decision in *DPP v. A.McD.* [2016] 3 I.R. 123.
- 11.** The application for leave filed, and the respondent's notice in response thereto, are both published along with this determination (subject only to any redaction required by law) and it is therefore unnecessary to set out the position of the parties in further detail. No aspect of this ruling has precedential value as a matter of law.
- 12.** The Court considers that the above matters regarding the proviso do constitute matters of general public importance and accordingly, leave to appeal to this Court will be granted. While it is doubtful that the s.18 issues in themselves might satisfy the constitutional threshold, the Court considers that in circumstances where the application of the proviso is an important issue in the appeal, it is desirable that the Court should hear arguments on these issues as well. The Court notes that these issues may arise in other criminal trials in the future and it would be in the public interest to obtain further clarity.
- 13.** The fifth matter contended for by the applicant relates to the admissibility of messages downloaded from a mobile phone. The Court considers that the principles relating to the admissibility of real evidence are well established, most recently by the Supreme Court in *DPP v. A. McD.* [2016] 3 I.R. 123, and that this is not a matter of general public importance. Further, the Court does not consider it necessary in the interests of justice that there be an appeal on this point to the Supreme Court.
- 14.** The Court considers, on a preliminary basis and pending any necessary refinement on case management, the issues in this case to be:

- (1) When, if ever, is a trial judge entitled to refuse to allow an accused to discharge his legal representatives and what procedures apply?
- (2) Is the proviso provided for by s.3 of the Criminal Procedure Act, 1993 properly applicable in circumstances where the trial judge refuses to allow the applicant to discharge his legal team and to conduct his own defence?
- (3) What are the circumstances governing the proper invocation of the inference provisions in s.18 of the Criminal Justice Act 1984, and in particular what amounts to the required "possession" of an "object, substance or mark" and whether messages downloaded from a mobile phone fall within the ambit of the terms "object, substance or mark" or "any mark on any such object"?
- (4) What are the principles governing a failure or refusal "to account for the presence of the object, substance or mark" for the purposes of s.18 of the Criminal Justice Act 1984, and in particular can a level of response by a person short of an admission amount to such a failure or refusal "to account"?

The Court grants the application for leave to appeal.

AND IT IS HEREBY SO ORDERED ACCORDINGLY.